No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY (a corporation),

Appellant,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (a corporation), and the UNITED STATES OF AMERICA, as claimant of the American Ship "Monongahela", her engines, tackle, apparel, etc.,

Appellees.

REPLY BRIEF FOR APPELLEES.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
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REPLY BRIEF FOR APPELLEES.

We shall avail ourselves of the court's permission to consider briefly matters urged in appellant's reply brief.

THE BURDEN OF PROOF AND THE NEW YORK FEDERAL CASES AS APPLIED TO THIS CASE.

Appellant endeavors lightly to dismiss Thayer's discussion of the term "burden of proof" and to ignore

Wigmore's "risk of non-persuasion" as "academic". This characterization of an argument does not answer it; particularly when the argument emanates from authorities so renowned as these great jurists; and especially when the argument has found such apt and pertinent recognition to the very situation involved in the case at bar as Judge Mack gave it in *Hildebrandt v. Flower Lighterage Co.*, 277 Fed. 436, where he said:

> "I cannot agree with counsel that the prima facie case can be met only by showing how the accident happened. In my judgment the true principle of law is *that the burden of proof is on the libelant to establish negligence;* that burden is prima facie met in the case of a demise by showing the failure to return in good condition, subject to ordinary wear and tear. *That puts upon the defendant the burden of going forward with evidence* to show a lack of negligence on its part. But when all the evidence is in, the court must weigh the situation and say: Was the respondent guilty of negligence or not?"

Judge Mack was affirmed by the Circuit Court of Appeals for the Second Circuit (277 Fed. 438) and these are precisely the distinctions that we urge and which appellant would have this court dismiss as "academic".

Now, that it has been noted (our opening brief pp. 19-20) that appellant's so-called "last word of law" on the subject from the *Schoonmaker* case is inapplicable here, appellant seems to have abandoned that case but clings still to the *Swensen* and *Terry* cases, as authorities controlling the decisions in the later *Hastorf*

and *Hildebrandt* cases. Relying on the two first named cases appellant argues that the Circuit Court of Appeals for the Second Circuit enforces an absolute liability upon a demise charterer who is unable to explain the loss of the bailed chattel; this despite the fact that in the last cases from that circuit (the *Hastorf* and *Hildebrandt* cases) the charterer was held not liable though unable to explain the cause of the loss.

If it were important here to harmonize what may at first blush seem a want of accord between the earlier and the later cases from the Second Circuit, it might be suggested that the rule laid down in the *Swensen* and *Terry* cases at most applies only where there is an express covenant to return in good order and condition, and that in the absence of such express covenant "there is" (in the words of the *Schoonmaker* case which postdates the *Swensen* and *Terry* cases) "no liability for injury to the vessel without proof of negligence" (268 Fed. at p. 104). In our case there was no such covenant. But we need not amplify along these lines or indeed determine whether the earlier and later cases need harmonizing. It is sufficient for present purposes that the *Swensen* and *Terry* cases were before the Circuit Court of Appeals for the Second Circuit when it affirmed Judge Mack's decision in the *Hildebrandt* case (our opening brief, p. 27), and that Judge Ward who sat in the *Hastorf* case in 1921 sat also in the *Terry* case in 1909; and that our case obviously comes within the rule announced and followed in the *Hildebrandt* and *Hastorf* cases. The gist of the rule is that the trial

court must be persuaded of the respondent's negligence, and that the fact that the respondent cannot put his finger upon the precise cause of the loss does not *per se* convict him of negligence.

Nor has appellant maintained a consistent position with regard to the rule it seeks to justify. First appellant urged that the charterer was obliged to explain the precise cause of the loss, relying on the *Schoonmaker, Swensen* and *Terry* cases, and making no reference to the later *Hastorf* and *Hildebrandt* cases. Now that the *applicable part* of the *Schoomaker* case has been shown to be adverse to appellant's contention, and that the *Hastorf* and *Hildebrandt* cases must be met, appellant abandons the former and (in effect) says of the latter that in them the charterer *more nearly* showed what happened than the appellees did in the case at bar. An appellant who comes to this after the strong position taken in its opening brief (that the charterer of the barge must show the cause of the loss absolutely or be liable), seems to be fighting pretty well with its back to the wall. If the obligation is absolute it will not do to say that the respondents in the particular case *pretty nearly* fulfilled their obligation. If appellant justifies the *Hastorf* and *Hildebrandt* cases, because in them the charterer *almost* explained the cause of the loss, then Judge Dooling's decision in this case must stand. There being no requirement to show the exact cause of the loss, the whole case goes back to the rule with which we started: Did the appellant, upon the

entire record satisfy the trial court that the appellees were guilty of negligence?

It is patent that it did not. The trial judge found it not shown that the barge was overloaded and the evidence as it has been reviewed shows it was not. As to method of loading there was a positive finding by a trial judge who heard and saw most of the witnesses that it was proper. These were the chief issues before the trial court as outlined by appellant's counsel in his opening statement (Apostles, p. 49). Failing in them counsel has in the briefs resorted to other charges. They have been fully considered in the earlier briefs and we believe the evidence amply sustains the trial court's absence of any findings of negligence in respect to any of them. There was no negligence and the fair inference is that the "Crowley 76" was lost on account of inherent weakness, as in

Hastorf Contracting Co. v. Standard Oil Co., 277 Fed. 884.

"DISINTERESTED WITNESSES".

When appellant referred in its opening brief to the witnesses Langren and Zecher as "independent" or "disinterested" (appellant's opening brief, pp. 19, 30), and even when its counsel repeated the claim on the oral argument, we were disposed to let it pass. But now that we have that claim set up in black type in appellant's second brief (p. 5) we may be permitted to remark that these men Langren and Zecher were

employed on the tug "Reliance" which was operated by the Shipowners and Merchants Tugboat Company, of which Mr. Thomas Crowley was the manager (Apostles, p. 208), and that Mr. Thomas Crowley verified the libel against the "Monongahela" in his capacity as president of the appellant corporation (Apostles, p. 34). How disinterested Zecher and Langren were likely to be in testifying in favor of the appellant may well be the subject of entertaining conjecture.

CAPTAIN MILLS' SURVEY.

Appellant says that Captain Mills' calculations were made up several days after the accident (reply brief, p. 9). The fact is that Captain Mills said he made out his survey report on December 22nd (Apostles, p. 178), but that the report was prepared on figures taken previously at the close of the discharge (Apostles, p. 174).

METHOD OF LOADING.

We have at last the admission in the reply brief that up to Monday morning there was nothing wrong with the barge or in its handling by the appellees, but that loading an additional amount on Monday caused the loss (reply brief, p. 10). Then the case comes to this: Appellees' handling of the barge and loading her in cones, with the trimming consequent thereon, were

proper, and it was the quantity loaded on Monday (we are told) that broke her. If, however, the amount loaded on Monday only brought the total amount loaded up to the amount which she was chartered to carry, what was the cause of the loss? Obviously her unfitness to carry the amount which she was chartered to carry.

THE EFFORT TO MAKE BAILEES INSURERS.

Our suggestion that appellant would make the bailee of a barge an insurer was in connection with the answer to appellant's contention that we were asking a change in the law. We pointed out that if appellant would hold a barge owner liable simply because the cause of the barge's loss had not been precisely shown, though extensive evidence had gone in on the circumstances surrounding the loss, and the trial judge had found that there was an absence of negligence and that the loss of the barge was probably due to inherent defect—then appellant was asking a change in the law to make the bailee of a barge an insurer in the sense that a common carrier is said to be an insurer (our opening brief, pp. 55-56). We cannot quite make out whether appellant still clings to that view. If it does, what we have said about the effort to make bailees insurers still applies. That would not be so, of course, if, now that the *Hildebrandt* and *Hastorf* cases have been called to its attention, appellant's position is, as we surmise,

that it cannot agree with the trial judge as to the adequacy of the evidence to exonerate appellees.

Dated, San Francisco,
June 5, 1922.

Respectfully submitted,

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellees.